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FEDERAL COMMUNICATIONS COMMISSION
OF THE UNITED STATES

CS Docket No. 94-44

COMMENTS OF LESEA BROADCASTING CORPORATION

The instant proceeding arises from a Petition for Expedited Rule Making ("Petition") filed by LeSEA on September 28, 1993, requesting amendment of Section 76.51 of the Commission's Rules to add Castle Rock as a designated community in the Denver, Colorado, television market. In the Petition, a copy of which is attached hereto and which is incorporated herein, LeSEA showed:

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List A B C D E

- That the coverage of KWHB substantially overlaps the coverage of the other market stations;
- That although KWHB is legally entitled to carriage within the Denver ADI, it has been notified by a number of cable systems that they will not carry the KWHB signal without copyright reimbursement; and
- That amendment of the Rules as requested will expand the coverage of KWHB within its ADI and permit the station to compete on a "level playing field" with other market stations.

In the NPRM, the Commission found that the LeSEA proposal "appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market" (at ¶ 8). The Commission went on to say that "it may . . . be helpful to receive additional comment on the competition between KWHB and other stations in the subject market for viewers, programming and advertising revenue, as well as how other media view the market" (at ¶ 9). The Commission also requested information concerning the extent of copyright liability and its impact on the station (at ¶ 9, n. 11).

As noted above, KWHB is located in the Denver ADI, and accordingly is entitled to carriage on cable systems located within that ADI.^{1/} However, since KWHB is deemed a "distant signal" for copyright purposes as to a number of cable systems

^{1/} 47 U.S.C. § 534(h) (1) (A) (1992).

within the ADI, those systems are not obliged to carry KWHD unless KWHD agrees to reimburse them for the additional copyright liability that such carriage triggers.^{2/}

KWHD estimates that at least 66,000 cable television homes which are now "distant" for copyright purposes would be rendered "local" by the requested amendment to Section 73.61, with the result that the copyright liability which would currently attach to carriage of the KWHD signal would be eliminated.^{3/} Though KWHD is classified as a "specialty station," so that carriage of the signal would not trigger the 3.75% copyright royalty "surcharge," carriage of KWHD as an independent distant signal nonetheless does trigger significant additional copyright liability for cable systems carrying the signal. Based upon an assumed basic tier rate of \$13.00 per month for the cable systems serving the 66,000 subscribers described above, KWHD estimates that the annual copyright liability attendant to carriage of its signal on the systems involved would range between \$27,286.00 and \$91,949.00.^{4/} This amount, while perhaps modest by some standards, is of no small consequence to a struggling UHF station

^{2/} 47 U.S.C. § 534(h)(1)(B)(ii)(1992). It should be noted that KWHD does not have "significantly viewed" status in any of the counties where these cable systems are located.

^{3/} These cable homes include homes served by cable systems in Boulder, Lyons, Broomfield, Longmont, Lafayette, Louisville, and Brighton.

^{4/} This range reflects the fact that the royalty rate for carriage of a "distant signal" varies, depending upon the number of other distant signals carried by the cable system involved. See 37 C.F.R. § 308.2(a)(1990).

such as KWHD. KWHD was constructed by LeSEA and began operation only four years ago, in July of 1990. As such, it is the "youngest" station in the Denver market. KWHD has suffered substantial losses in each year of its operation, and such losses now total well in excess of \$2,000,000.00.

KWHD is clearly in competition with other stations in the market. On a number of occasions, KWHD personnel have been told by advertisers and prospective advertisers that the advertisers have been visited by salespeople for competing stations in the market, who point to KWHD's lack of cable penetration in an effort to lure the advertisers to other stations. Further, program syndicators have advised KWHD that they will not make programs available to KWHD that have already been sold to other stations in the market, and in those instances where KWHD is able to purchase syndicated programming, it is at the same rates as Denver and other market stations would pay for that programming.

Local print media clearly view Castle Rock as part of the Denver market. For example, the Denver newspapers regularly report news items from Castle Rock, and television listings of both major Denver newspapers include the KWHD program schedule.

Finally, it is submitted that the overlap of the KWHD contour with those of other stations in the ADI, as demonstrated in the Petition, makes it self-evident that the station competes with other market stations for viewers.

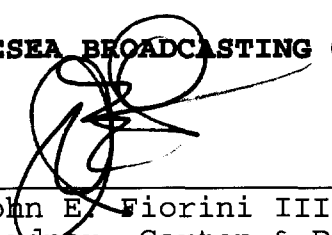
It should also be noted that amendment of the rules as proposed herein would provide significant public interest

benefits by making available to over 60,000 new television homes programming not currently available to them. This programming includes:

- Exclusive broadcast of 72 weekly programs not currently carried on the cable systems, including five children's programs, one of which, "Kids Adventure Zone," is produced at LeSEA headquarters in South Bend, Indiana;
- 26 hours per week of locally produced programming;
- Coverage of area high school sporting events;
- Coverage of WAC Conference (local college conference) football and basketball; and
- Local programming featuring activities of area governmental agencies, events, charities, and other non-profit organizations.

Respectfully submitted,

LESEA BROADCASTING CORPORATION



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July 7, 1994

Its Attorney

STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 76.51(a) of)
the Commission's Rules to Add)
Castle Rock as a Designated)
Community in the Denver,)
Colorado, Television Market)

NM Docket No.

To: Chief, Mass Media Bureau

PETITION FOR EXPEDITED RULEMAKING

LESEA BROADCASTING CORPORATION

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September 28, 1993

Its Attorneys

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
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Amendment of Section 76.51(a) of)	
the Commission's Rules to Add)	
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To: Chief, Mass Media Bureau

PETITION FOR EXPEDITED RULEMAKING

LeSEA Broadcasting Corporation ("Petitioner"), licensee of television broadcast station KWHD, Channel 53, Castle Rock, Colorado, pursuant to Section 1.401 of the Commission's Rules, hereby petitions for amendment of Section 76.51(a) of the Commission's Rules to redesignate television market number 32, presently designated as "Denver, Colorado", as "Denver - Castle Rock, Colorado." Petitioner further requests the Commission to consider this petition under the expedited procedures adopted in its recent Report and Order in MM Docket No. 92-259.^{1/}

^{1/} Implementation of the Cable Television Consumer Protection and Competition Act of 1992, FCC 93-144, 8 FCC Rcd. _____ (released March 29, 1993) ("Must-Carry Order"). At paragraph 50, the Must-Carry Order provides for issuance of a notice of proposed rulemaking without first seeking public comment on requests such as Petitioner's. Further, Section 76.51, as amended by the Must-Carry Order, includes a Note providing, in part, that petitions for rulemaking "shall not be subject to the public notice provisions of Section 1.403 of this chapter."

I. INTRODUCTION AND BACKGROUND

Station KWHD is licensed to Castle Rock, Colorado, a community located approximately 20 miles due south of Denver on Interstate Route 25. Castle Rock is included within the Denver Metropolitan Statistical Area (MSA), as designated by the U.S. Office of Management and Budget. Castle Rock is included by Arbitron in the Denver Survey Area, Denver Area of Dominant Influence (ADI), and Denver Metro Rating Area. Station KWHD places a Grade B signal over all of Denver and its principal suburbs, including Lakewood, Aurora, Englewood, Wheat Ridge, Arvada, Westminster, Thornton, Golden and Brighton. The coverage area of Station KWHD substantially overlaps the coverage areas of the eight television stations which are licensed to Denver.^{2/}

Although Station KWHD is entitled to carriage on Denver-area cable systems under the rules adopted in the Must-Carry Order, such carriage would engender copyright license liability for the cable operators. This is because Section 111 of the Copyright Act, 17 U.S.C. § 111(f), continues to define "local" and "distant" television station signals pursuant to the Commission's old must-carry rules which preceded those adopted in the Must-Carry Order. For purposes relevant to Petitioner's request, the prior must-carry rules include classification of a signal as

^{2/} The eight television stations licensed to Denver are: KWGN-TV, Channel 2; KCNC, Channel 4; KMGH-TV, Channel 7; KUSA-TV, Channel 9; KTVD, Channel 20; KDVR, Channel 31; KCEC, Channel 50; and KUBD, Channel 59.

"local" where the television station's city of license has "designated community" status in the Commission's Top 100 Market List under Section 76.51 of the Rules. Accordingly, redesignation of the Denver market as "Denver -- Castle Rock" under Section 76.51 as proposed in this Petition, will permit Denver-area cable systems to carry KWHD on an equal basis with other television stations in the market without incurring "distant signal" copyright liability.

II. PETITIONER'S PROPOSAL MEETS THE "COMMONALITY" REQUIREMENT ESTABLISHED UNDER THE MUST-CARRY ORDER

The Commission recognized in its Must-Carry Order that its Section 76.51 Top 100 Market List was out of date, having been derived largely from Arbitron's 1970 prime time household rankings. Indeed, the Commission acknowledged that Section 614(f) of the Cable Act of 1992 requires the Commission to make revisions needed to update the list and the designated market communities included in the list.^{3/} The Commission further recognized that since Congress had specifically directed the Commission to use current ADI markets for determining must-carry rights, the required updating of Section 76.51 list would primarily affect copyright liability.^{4/} The Commission decided, however, that the record was insufficient in the Must-Carry Proceeding (MM Docket No. 92-259) to make wholesale

^{3/} Must-Carry Order, para. 48.

^{4/} Id.

revisions to Section 76.51, concluding that it would only update the existing list by adding those designated communities requested by parties providing specific evidence that change to a particular market is warranted.^{5/} The Commission stated that it would expect such parties to provide evidence that "demonstrates commonality between the proposed community to be added to a market designation and the market as a whole."^{6/}

There is strong evidence of commonality between Castle Rock and the Denver market as a whole. As already noted, Castle Rock is included within the Denver MSA. "The general concept of a metropolitan area [which includes MSA's, CMSA's and PMSA's] is one of a large population nucleus together with adjacent communities which have a high degree of social and economic integration with that nucleus."^{7/} Thus, under the federal government's own definition, Castle Rock is recognized as an integral part of the Denver market.

The commonality between Castle Rock and Denver is also reflected in Arbitron's treatment of the Denver market. Thus, Arbitron includes Castle Rock not only within the larger Survey

^{5/} The Commission made only three modifications to the Section 76.51 list in its Must-Carry Order pursuant to such individual requests: renaming the Columbus, Ohio market to include Chillicothe; adding New London to the Hartford-New Haven-New Britain-Waterbury, Connecticut, market; and changing the Atlanta, Georgia, market to Atlanta-Rome. Must-Carry Order, para. 50.

^{6/} Id.

^{7/} Statistical Abstract of the United States 1992, 112th Edition, U.S. Department of Commerce, Bureau of the Census, p. 4.

Area, but also within the Denver ADI and Metro Area as well.^{8/} The ADI, a standard market definition consisting of all counties in which the home market stations receive a preponderance of viewing, reflects Arbitron's view that Castle Rock and Station KWHB are part of the Denver market. The ADI establishes that, for economic purposes, KWHB participates in a common television market with the stations licensed to Denver.

III. PETITIONER'S PROPOSAL MEETS THE TRADITIONAL TEST FOR A HYPHENATED TELEVISION MARKET

The Commission has defined a hyphenated television market as one characterized by more than one major population center supporting all stations in the market, including competing stations licensed to different cities within that market area.^{9/} The Denver market consists of two population centers: Denver and its immediately adjacent suburbs form a single large population center; and the community of Castle Rock, some 20 miles to the south, represents a less populous but distinctly separate population center which, along with Denver and its immediate suburbs, is encompassed within Arbitron's Denver Metro Rating Area and the Denver MSA. Castle Rock is the county seat and the only community of any size in Douglas County, which forms most of the southern "leg", and constitutes a sizable portion, of

^{8/} Broadcasting & Cable Yearbook, Arbitron ADI Market Atlas, p. C-152.

^{9/} Cable Television Report and Order, 36 FCC 2d 143, 176 (1972).

the Denver MSA. (See Exhibit A). Thus, a Denver - Castle Rock hyphenation would meet the first prong of the Commission's definition of a hyphenated market.

The second prong of the definition is also met. Exhibit B hereto, a map depicting the Grade B contours of Station KWHD and the eight Denver television stations, shows clearly that both population centers support all nine stations -- to wit, with the exception of KUBD, Denver (Channel 59), all nine Grade B contours encompass both communities.^{10/}

The Commission also has stated that the "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities.^{11/} This definition is met as well. The Castle Rock station, KWHD, and the stations licensed to the presently designated Section 76.51 community of Denver, have coverage areas that substantially overlap; and, all of these stations do, in fact, compete for audiences throughout the market area. KWHD relies on the entire area encompassed by its Grade B contour for economic support. There can be little doubt that KWHD is unavoidably competing with the other stations in the Denver -- Castle Rock market.

The Commission traditionally has looked to four factors in evaluating individual market conditions consistent with the

^{10/} Station KUBD's Grade B contour falls just slightly short of Castle Rock.

^{11/} CATV-Non Network Agreements, 46 FCC 2d 892, 898 (1974).

underlying competitive purpose of the market hyphenation rule:

(1) the distance between the proposed community and the existing designated community; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the change.^{12/}

All four factors are supportive of the proposed redesignation of the Denver market. First, Castle Rock is proximate (20 miles due south) and readily accessible by interstate highway to Denver. By contrast, the redesignation of the Atlanta market as Atlanta-Rome, as approved in the Must-Carry Order, involved communities that are some 56 miles apart.^{13/}

The second factor, whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area, would no longer seem to have relevance given that the new must carry rules adopted by the Commission in the Must-Carry Order are keyed to the ADI rather than the Grade B contour looked to under the old must-carry rules. Nonetheless, the proposed modification of Section 76.51 substantially complies

^{12/} See, e.g., Major Television Markets (Fresno-Visalia, Calif., 57 RR 2d 1122 (1985)).

^{13/} It should be noted that the distance between Rome and Atlanta was not ameliorated by co-location of transmitters, a factor sometimes considered by the Commission in addressing the proximity factor. See, Request of TV 14, Inc. to Amend Section 76.51 of the Commission's Rules, 7 FCC Rcd 8591, 8592 (1992).

with this criterion as well since the majority of Denver-area cable systems which would be affected by the rule change are within Station KWHD's Grade B contour. These include cable systems serving the principal Denver suburbs of Lakewood, Aurora, Englewood, Wheat Ridge, Arvada, Westminster, Golden and Brighton.

With respect to the third factor, a particularized need for the proposed rule change exists. Station KWHD already has been notified by several Denver-area cable systems that they will not carry the station because of copyright liability. The need for the proposed amendment to Section 76.51 is thus not theoretical, but real and immediate. Finally, the public will benefit from the proposed redesignation because it will bring to the cable systems in the Denver-area diversified programming from an independent UHF television station.

III. CONCLUSION

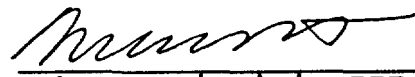
Petitioner's proposed redesignation of the Denver market is consistent with the rationale of the Must-Carry Order, meets the "commonality" standard described therein, and would address the anomalous circumstances created by the treatment of Station KWHD as a "local signal" under the new must-carry rules and as a "distant signal" for copyright liability purposes with respect to Denver-area cable systems. In addition, the requested redesignation meets the standards traditionally applied by the Commission in creating hyphenated markets under Section 76.51 of its Rules. Accordingly, it is requested that the Commission

issue a notice of proposed rulemaking to amend Section 76.51 of the Rules to redesignate the Denver market as "Denver - Castle Rock", in accordance with the expedited rulemaking procedures established in the Must-Carry Order.

Respectfully submitted,

LESEA BROADCASTING CORPORATION

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September 28, 1993

Its Attorneys

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ClearType®
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COLORADO
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Explanation of Symbols

★ State Capital

⬢ County Seat

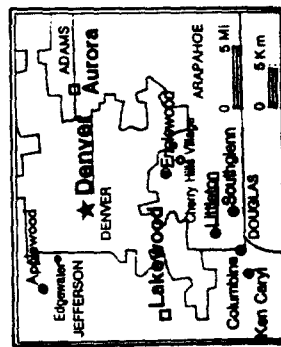
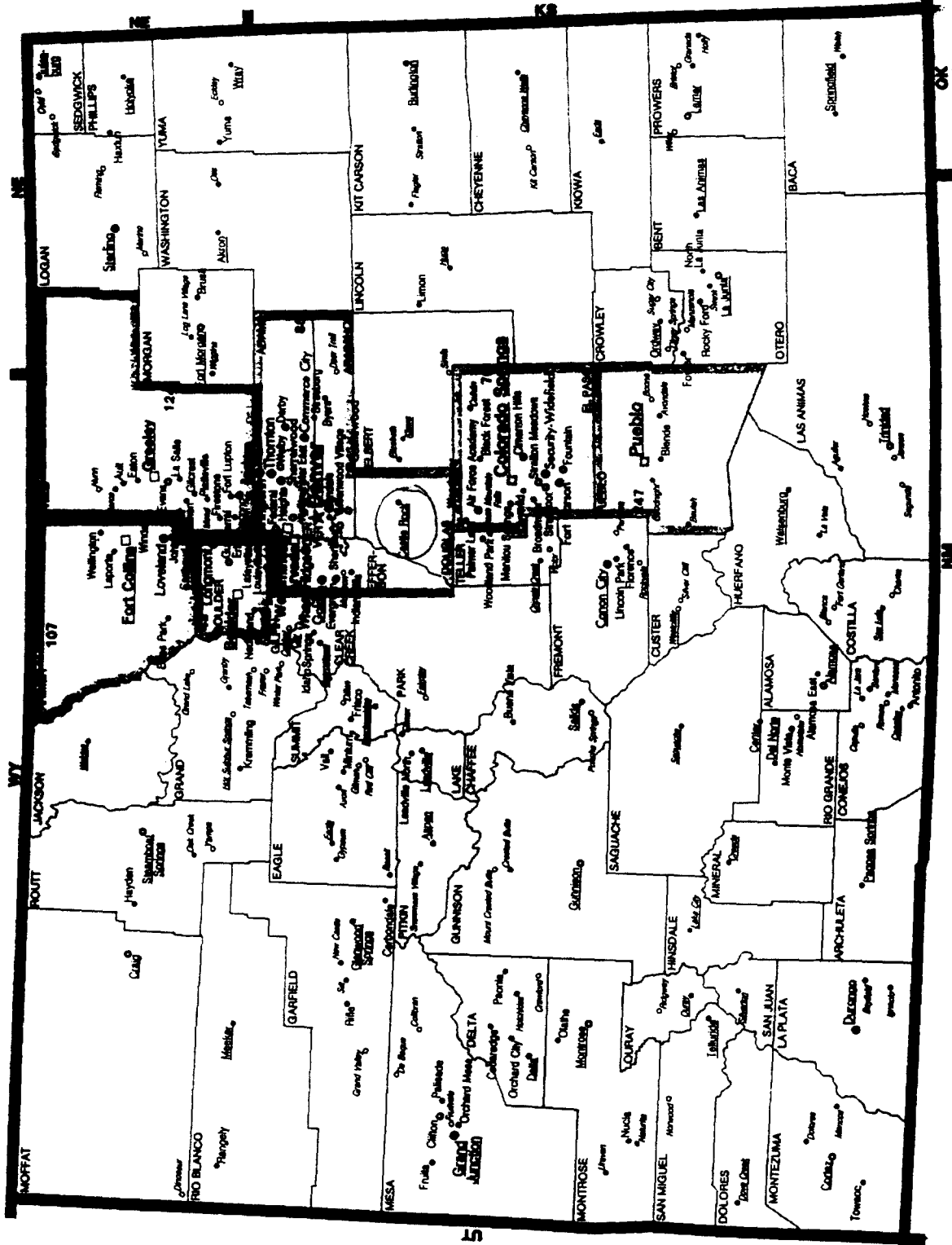
— MSA Boundary

124 MSA Number

Population Key

- Under 250
- 250-499
- 500-999
- 1,000-2,499
- 2,500-4,999
- 5,000-9,999
- 10,000-19,999
- 20,000-24,999
- 25,000-49,999
- ◻ 50,000-99,999
- ◻ 100,000-249,999
- 250,000-999,999

Note: See page 152 for official MSA names



GRADE B COVERAGE CONTOURS

KWHD
KWB
KNC
KMGH
KUSA
KTVD
KDV
KCEC
KUBD

KWHD-TV53

—SEA BROADCASTING CORPORATION

